

AUG 10 2007

[286] Attorney Docket No. : BET-105US

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Nathan W. Levin, Daniel Schneditz, and Fansan Zhu
Appl. No. : 10/089,831
Filed : April 4, 2002
For : METHODS AND APPARATUS FOR MEASURING THE
VOLUME OF FLUID IN THE PERITONEAL CAVITY
Examiner : B. Huh
Group : 3767

RESPONSE

This is in response to the Office Action dated April 11, 2007.

Submitted herewith is a petition under 37 CFR §1.136 and the required fee requesting a one month extension in which to file this Response. With the extension, this paper is due on August 13, 2007.

No further extension of time is believed to be necessary for the filing of this Response, but if such an extension of time is required, applicants request that this be considered a petition therefor. The Director is hereby authorized to charge any fees which may be required for such an extension to Deposit Account No. 11-1158.

The undersigned attorney would like to thank Examiner Huh for the helpful telephone interviews conducted on July 19, 2007 and August 2, 2007.

During the July 19th interview, the undersigned outlined applicants' belief that various of the issues raised in the April 11th Office Action, such as the §103 rejection based on the Peabody/Hagan combination, had been considered and resolved in the prior prosecution of this application. The undersigned also outlined applicants' view that their claims satisfy the requirements of §101 and §112.

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During the July 19th interview, Examiner Huh suggested that applicants submit a written description of their position and that the interview be continued until the following week. The Examiner indicated that he would contact the undersigned to set a mutually convenient time and date. As requested, on July 19th, applicants sent a facsimile to Examiner Huh (copy attached as Exhibit A) with their position.

On August 2, 2007, the undersigned called Examiner Huh to determine the status of the proposed continuation of the July 19th interview. The Examiner informed the undersigned that the case was going to be transferred to another examiner (Examiner Catherine Witczak) and that Examiner Witczak would review applicants' July 19th facsimile, consult with Examiner Hayes regarding the prior prosecution of this application, and get back to the undersigned.

The undersigned told Examiner Huh that the four-month response date for the April 11th Office Action was August 13th and that to avoid further extension of time fees, applicants would appreciate hearing from Examiner Witczak prior to that date. Examiner Huh indicated that he expected that Examiner Witczak would contact the undersigned during the week of August 6, 2007.

On August 8, 2007, the undersigned called Examiner Witczak and learned from her voice mail that she would be out of her office until after the August 13th due date for the response to the April 11th Office Action. Applicants still wish to continue the interview begun with Examiner Huh in order to move this application forward as expeditiously as possible. However, to avoid unnecessary extension of time fees, this response is being filed in advance of such a continuation of the interview.

As indicated above, during the July 19th interview, Examiner Huh asked applicants to set forth their position in writing and applicants responded with their July 19th facsimile. Applicants believe that the facsimile addresses the issues raised in the April 11th Office Action and thus they incorporate that facsimile herein and request that it be treated as a response to the Office Action.

In item (3) of the facsimile, applicants requested further insight into the Examiner's objection to the language of Claim 12. The language in question reads:

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"determining the volume of fluid in the peritoneal cavity while step (A) is being performed by a bioimpedance measurement directed at the peritoneal cavity." Upon further review of this language, applicants believe that the Examiner is suggesting that the phrase "by a bioimpedance measurement directed at the peritoneal cavity" could be read as modifying "while step (A) is being performed" instead of modifying "determining the volume of fluid in the peritoneal cavity" as intended.

Applicants submit that in the context of their specification, the alternate interpretation described above would not in fact be adopted by a person skilled in the art. Step (A) of Claim 12 calls for "continuously flowing dialysis fluid through a subject's peritoneal cavity." The phrase "by a bioimpedance measurement directed at the peritoneal cavity" simply does not work as a modifier of this language. Accordingly, applicants submit that Claim 12 is clear as written. However, if applicants' understanding of the Examiner's comments are incorrect or if the Examiner continues to believe that the language of this claim needs modification, the Examiner is requested to contact the undersigned to discuss the issue further.

The July 19th facsimile did not explicitly address applicants' calibration constant claims. As with their volume of the peritoneal cavity claims, applicants submit that the determination and display of a calibration constant represents a useful, concrete, and tangible result. As just one example, the display of a calibration constant can be used as a reliability check to confirm that an operator has properly set up equipment and/or is properly performing a procedure. It is a common experience that calibration values are routinely recorded to provide historical data on equipment and processes. As with the display of heart rate data, applicants respectfully submit that it will make little sense for the Patent Office to adopt a policy where the display of useful data, such as the value of a calibration constant, does not satisfy the requirements of §101 and §112.

The foregoing comments in combination with the July 19th facsimile submitted herewith are believed to be fully responsive to the issues raised in the April 11th Office Action. The undersigned welcomes a continuation of the interview begun with Examiner Huh should that be considered helpful by Examiner Witczak. Alternatively,

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for all of the above reasons, applicants submit that the application is in condition for allowance and thus such action is respectfully requested.

Respectfully submitted,

Date: 8/10/07

Maurice Klee
Maurice M. Klee, Ph.D.
Reg. No. 30,399
Attorney for Applicant
1951 Burr Street
Fairfield, CT 06824
(203) 255-1400